Filed 8/27/19 Beverly Ann Hollis-Arrington v. Cendant Mortgage Corp. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BEVERLY ANN HOLLIS-ARRINGTON, Plaintiff and Appellant. v. CENDANT MORTGAGE CORPORATION, Defendant and Respondent.	B287083 (Los Angeles County Super. Ct. No. LC061596)

APPEAL from an order of the Superior Court of Los Angeles County, Huey P. Cotton, Judge. Affirmed.

Law Offices of Vincent Miller and Vincent Miller for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton and Kerry W. Franich for Defendant and Respondent.

Beverly Ann Hollis-Arrington appeals from an order dismissing Cendant Mortgage Corporation (Cendant), doing business as PHH Mortgage Corporation, with prejudice. The trial court entered the dismissal order after sustaining Cendant's demurrer without leave to amend based on claim preclusion and failure to state claims for wrongful foreclosure, fraud and deceit, quiet title, violation of the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), slander of title, and intentional and negligent infliction of emotional distress. Hollis-Arrington contends claim preclusion does not apply because her primary rights were not litigated and adjudicated on the merits in the four federal actions she filed that were decided before Cendant filed its demurrer. She also seeks leave to amend. We affirm.

BACKGROUND AND PROCEDURAL HISTORY

A. *Hollis-Arrington's Loan from Cendant*

On July 3, 1999 Hollis-Arrington submitted a loan application to Cendant to refinance the mortgage on her home (the property).[1] Hollis-Arrington, who is Black, disclosed on her application she was self-employed, was a party to pending civil litigation, had problems on her credit report, and had a prior foreclosure action. Cendant allegedly altered information on the application and submitted false information to Fannie Mae's desktop underwriting system to generate an automatic approval. This was part of Cendant's scheme to grant loans to Black applicants with poor credit histories, then foreclose on the properties after the applicants defaulted on their loans. Hollis-

[1] The factual summary is taken from the allegations of the verified first amended complaint in this action.

Arrington would not have qualified for a loan but for Cendant's falsification of her application. In August 1999 Cendant provided a $180,400 loan to Hollis-Arrington, secured by a deed of trust on the property.

Fannie Mae purchased the loan from Cendant in early September 1999, but Cendant remained the loan servicer. Cendant sent Hollis-Arrington a payment coupon book, which stated the wrong monthly payment amount. In October 1999 Hollis-Arrington experienced health and legal problems, and fell behind on her loan payments. She was in arrears for three months at the time she applied for a forbearance agreement in January 2000.

On April 24, 2000 Cendant, as the beneficiary of the deed of trust, executed and recorded a substitution of trustee, naming Attorneys Equity National Corporation (Attorneys Equity) as the new trustee under the deed of trust. Hollis-Arrington alleged the substitution of trustee was false because Fannie Mae was the beneficiary on the deed of trust, and Cendant did not have authority to execute the substitution.

B. *Events Leading to the Foreclosure*

From January to May 2000 Hollis-Arrington was in negotiations with Kevin Glover in Cendant's loss mitigation department concerning her application for loan forbearance. Glover told Hollis-Arrington he was approving the forbearance agreement and would submit her package for final approval. But on May 10, 2000 Cendant informed Hollis-Arrington that her application for a forbearance agreement had been denied.

To forestall the first foreclosure sale scheduled for May 11, 2000, Hollis-Arrington filed a Chapter 13 bankruptcy case, which

the bankruptcy court later dismissed. In July 2000 Hollis-Arrington filed a second bankruptcy case, which the bankruptcy court dismissed with a 180-day bar on filing a new bankruptcy petition.

Cendant then set a foreclosure sale for September 18, 2000. To avoid the sale, on September 11 Hollis-Arrington executed and recorded a quitclaim deed transferring title to her daughter, Crystal Monique Lightfoot. Lightfoot filed a bankruptcy petition on September 14. The bankruptcy court sent notices of the Lightfoot bankruptcy to Cendant and Attorneys Equity. Hollis-Arrington and Lightfoot also notified Attorneys Equity that on September 14 the property had been transferred to Lightfoot by quitclaim deed. Notwithstanding notice of the bankruptcy, on September 18 the property was sold at a foreclosure sale, and on September 21 Attorneys Equity recorded the deed of trust.

Hollis-Arrington was not aware the property had been sold. On October 20, 2000 Andrea Jenkins, a Cendant employee in the foreclosure department, told Hollis-Arrington the foreclosure sale would be postponed to January 15, 2001 to allow her to refinance the loan. Jenkins and Cendant knew this was false because title had already been transferred in the foreclosure sale.

C. *The First Federal Action*

On October 18, 2000 Hollis-Arrington filed her first lawsuit in the United States District Court for the Central District of California alleging breach of the covenant of good faith and fair dealing, fraud and deceit, negligence, and intentional infliction of emotional distress. (*Hollis-Arrington v. Cendant Mortgage Corp.* (C.D.Cal., July 15, 2002, No. CV 00-11125 CBM (AJWx)) 2002 U.S.Dist. Lexis 29703, p.*3 (first federal action).) Hollis-

Arrington based her claims on her allegation that when she fell behind in her mortgage payments, Cendant promised she would qualify for a forbearance agreement, but it later denied her application.

During the pendency of the first federal action, Hollis-Arrington and Lightfoot filed new bankruptcy petitions. On February 6, 2001 Attorneys Equity recorded a notice of rescission of the deed of trust. On May 25 Cendant obtained relief from the automatic stay to sell the property. At a June 29, 2001 foreclosure sale, the property was sold to third party purchasers Ed Feldman and Harold Tennen.[2]

On May 13, 2002 Cendant filed a motion for summary judgment, which the district court granted. (*Hollis-Arrington v. Cendant Mortgage Corp., supra*, 2002 U.S.Dist. Lexis 29703.) The court ruled there was no breach of the covenant of good faith and fair dealing because the deed of trust provided for nonjudicial foreclosure; Glover's declaration stated he did not promise Hollis-Arrington that she qualified for a forbearance agreement; Glover told Hollis-Arrington she needed to pay $5,000 towards her arrearages to obtain a forbearance agreement; and Hollis-Arrington did not tender the $5,000 payment. (*Id.* at pp. *9-*10.)

The court found there was no evidence to support the claim for fraud and deceit, which was based on Hollis-Arrington's assertion she relied on Cendant's promise of a forbearance agreement in delaying her request for refinancing and filing for bankruptcy to forestall the foreclosure sale, because she did not

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[2] Subsequently Feldman and Tennen sold the house to Robert Matthews, who later sold it to the current owners, Ryan and Tara McGinnis. Matthews and the McGinnises are named defendants in this action.

present evidence she was precluded from refinancing the property, and she successfully filed for bankruptcy to forestall foreclosure. (*Hollis-Arrington v. Cendant Mortgage Corp., supra*, 2002 U.S.Dist. Lexis 29703 at pp. *10-*11.) As to the negligence claim, the court ruled Cendant did not owe Hollis-Arrington a duty of care; thus, the claim failed as a matter of law. (*Ibid.*) The court also found Cendant could not be held liable for intentional infliction of emotional distress based on assertion of its legal rights under the note and deed of trust to insist on timely payments and to initiate foreclosure proceedings after Hollis-Arrington failed timely to cure her default. (*Id.* at pp. *12-*13.)

The district court entered judgment in favor of Cendant on July 15, 2002. Hollis-Arrington appealed, and the Ninth Circuit affirmed on April 17, 2003. (*Hollis-Arrington v. Cendant Mortgage Corp.* (9th Cir. 2003) 61 Fed.Appx. 462.)

D. *The Second Federal Action*

On June 27, 2001, two days before the scheduled foreclosure sale, Hollis-Arrington filed a second case against Cendant and Fannie Mae in the United States District Court for the Central District of California. (*Hollis-Arrington v. Cendant Mortgage Corp.* (C.D.Cal., Sept. 14, 2001, No. CV 01-5658 CBM (AJWx)) 2001 U.S.Dist. Lexis 27441 (the second federal action).) The second amended complaint asserted 13 claims against Cendant, Fannie Mae, and Attorneys Equity, including alleged violations of the Racketeer Influenced and Corrupt Organizations Act (RICO; 18 U.S.C. § 1961 et seq.), Federal Truth in Lending Act (TILA; 15 U.S.C. § 1601 et seq.), and Real Estate Settlement Procedures Act of 1974 (12 U.S.C. § 2601 et seq.); rescission of the Cendant loan under TILA; civil rights violations under title 42 of

the United States Code section 1983; fraud and deceit; negligent misrepresentation; civil conspiracy; intentional infliction of emotional distress; failure to follow the foreclosure procedures in Civil Code section 2924;[3] quiet title; and slander of title.

In her second amended complaint, Hollis-Arrington alleged the following facts.[4] "Defendant Cendant deliberately altered the true information contained on this plaintiff's original application, and the application in which they approved and funded, by misstating to Fannie Mae, this plaintiff[']s reserves, credit history, and the fact that this plaintiff was self[-]employed for a portion of 1999. Defendant Cendant Mortgage also concealed the fact that this [p]laintiff was involved in a lawsuit, which was truthfully disclosed on the loan application." Further, "Defendants Cendant Mortgage Corporation, Fannie Mae, and [A]ttorneys [E]quity Service misused the trust of low and middle [income] People of color in a complex financial scheme to make loans to people they knew were not qualified for the real estate loans[.] Cendant would then manipulate the desk top underwriting system of Fannie Mae to generate an automatic accept score, with the full knowledge that the borrower would in all likelihood default on the loan, to take the property from the borrowers." On September 10, 1999 Cendant sent her a payment coupon book with an incorrect monthly payment amount. On December 4 Cendant, as the loan servicer, sent a letter demanding payment of $4,111.17 in order for Hollis-Arrington to

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[3] Civil Code section 2924 establishes requirements for a nonjudicial foreclosure sale, including required notice of the sale.

[4] We summarize the facts as alleged for purposes of our later analysis of claim preclusion.

avoid foreclosure, knowing the loan amount it was "attempting to collect w[as] false and fraudulently calculated."

Hollis-Arrington became ill in October 1999 and incurred "enormous legal expenses," leading her to submit an application for a forbearance agreement. In February 2000 Cendant sent a letter to Hollis-Arrington, acknowledging receipt of her request. That March she requested that Cendant allow her "to make a partial payment on her delinquent loan, pending approval of the forbearance agreement." However, Cendant and Fannie Mae "schemed to defraud this plaintiff into believing that a review process for a forbearance agreement was underway, when in fact defendant[s] Cendant Mortgage and Fannie Mae were stalling for time in order to increase the amount that this plaintiff falsely owed . . . , so that the lump sum needed to cure the loan would be almost impossible for this plaintiff to tender, thereby clearing the way to acquire this plaintiff[']s home by way of trustee sale."

On May 10, 2000 Hollis-Arrington received a letter from Cendant indicating Fannie Mae, which now owned the loan, had declined her application for a forbearance agreement and required her to pay $10,920 plus late charges and foreclosure fees to cure the default. Hollis-Arrington filed for a Chapter 13 bankruptcy, and Fannie Mae, Cendant, and Attorneys Equity filed a "false and fraudulent" claim in her bankruptcy case for repayment of the loan. Fannie Mae audited the loan, and on August 29 Fannie Mae demanded Cendant repurchase the loan because it did not meet Fannie Mae's requirements. According to Hollis-Arrington, "[s]aid fraudulent acts . . . form a pattern of misrepresentation and fraudulent activity perpetrated on this plaintiff . . . through a pattern of illegal activity by the defendants and a scheme of predatory lending directed at

minority borrowers who are most vulnerable and are in financial distress."

On August 2, 2000 Hollis-Arrington attempted to refinance the loan. A loan agent told her there were errors in the HUD-1 settlement statement mortgage lending form. On September 5 Hollis-Arrington transferred a 50 percent interest in her home to her daughter, who then filed for Chapter 13 bankruptcy. On September 18 Fannie Mae, through Cendant and Attorneys Equity, "illegally held the trustee sale" in violation of the automatic stay.

Hollis-Arrington was not aware the property had been sold. In October 2000 she filed the first federal action, and in January 2001 she moved for a temporary restraining order to prevent the foreclosure sale. In response to her motion, Cendant's counsel and its vice president filed declarations stating Cendant was voluntarily postponing the foreclosure sale until February 6, 2001. Hollis-Arrington relied on the declarations and attempted to refinance the loan, but she was unable to refinance because Cendant no longer held title to the property. Instead, "the trustee's deed show[ed] that the foreclosure sale was indeed held on September 18, 2000, even as counsel and Fannie Mae, by and through [its] loan servicer, Cendant Mortgage[,] deceived the court and this plaintiff into believing that the property was in the name of the plaintiff, and that no sale had taken place, the property had indeed had been returned to Fannie Mae, in violation of the automatic stay."

On February 6, 2001 Attorneys Equity rescinded the deed of trust transferring the property. On April 20, 2001 Hollis-Arrington paid $1,370 to Cendant, which Cendant accepted as her April mortgage payment. After accepting her payment,

Cendant did not record or send her a new notice of default on her loan. After the bankruptcy court lifted the automatic stay, on June 29, 2001 Attorneys Equity held a trustee sale. According to Hollis-Arrington, Cendant, Fannie Mae, and Attorneys Equity "slander[ed] the title by using a trustee's deed to transfer title unlawfully to Ed Feldman and Harold Tennen, who appear to be nothing more than straw buyers for the defendants."

On May 28, 2002 the federal district court dismissed Hollis-Arrington's federal claims against Cendant and Fannie Mae with prejudice. On July 1, 2002 the court dismissed with prejudice the federal claims against Attorneys Equity and the state claims against all defendants. The court found Hollis-Arrington failed to state a claim for fraud and deceit and negligent misrepresentation because the declarations submitted in the first federal action on which she allegedly relied in attempting to refinance the loan were privileged. The court dismissed the intentional infliction of emotional distress claim because Hollis-Arrington failed to allege any facts to show there was "outrageous conduct." The court found the quiet title claim failed because Hollis-Arrington alleged Feldman and Tennen held title to the property, but she did not name them as defendants. As to slander of title, the court dismissed the claim because Hollis-Arrington did not allege "the publication of an untrue matter that encumbered her ability to sell the property." The court entered a judgment dismissing the case on July 1, 2002. Hollis-Arrington appealed, and the Ninth Circuit affirmed.

E. *The Filing of This Action and Path to the United States Supreme Court (The Third Action)*

On July 18, 2002 Hollis-Arrington and Lightfoot filed a complaint in the Los Angeles Superior Court against Cendant, Fannie Mae, Attorneys Equity, and Matthews, the then-owner of the property. The verified complaint alleged 11 causes of action, including wrongful foreclosure, void trustee's deed,[5] fraud and deceit, violation of the Unruh Civil Rights Act, violation of Civil Code section 2924, slander of title, negligent misrepresentation, civil conspiracy, intentional infliction of emotional distress, adverse possession, and declaratory relief. On August 22, 2002 Fannie Mae petitioned to remove the case to federal court (No. CV 02-6568 CBM (AJWx)). Hollis-Arrington filed an application to remand the matter to state court, which the court denied on September 5, 2002.

For the next 15 years, the case proceeded in the federal courts, up to the United States Supreme Court, and ultimately back to state court. On February 20, 2003 the district court granted Cendant, Fannie Mae, and Matthews's motion to dismiss the complaint based on res judicata and collateral estoppel and Matthews's alternative motion to dismiss for failure to state a claim. Hollis-Arrington and Lightfoot appealed, and in May 2003 the Ninth Circuit dismissed the appeal for lack of jurisdiction.[6]

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[5] This claim was asserted only on behalf of Lightfoot.

[6] On November 21, 2003 Hollis-Arrington filed a fourth action against Cendant and others in the United States District Court for the District of Columbia (No. 01:03-CV-02416 TPJ). On February 17, 2004 the district court dismissed the complaint, ruling most of the claims were barred by res judicata, and the court lacked jurisdiction over the defendants who were not

On April 7, 2009 Hollis-Arrington and Lightfoot belatedly filed a motion for entry of judgment. On October 21, 2009 the federal district court entered judgment in favor of Fannie Mae, Cendant, and Matthews.[7] Hollis-Arrington and Lightfoot appealed the judgment, which was affirmed by the Ninth Circuit. (*Lightfoot v. Cendant Mortgage Corp.* (9th Cir. 2012) 465 Fed.Appx. 668.) Later the Ninth Circuit withdrew the disposition and ordered the parties to brief whether Fannie Mae's federal charter granted federal question jurisdiction over cases involving Fannie Mae. (*Lightfoot v. Cendant Mortgage Corp.* (2014) 769 F.3d 681, 682-683.) The Ninth Circuit concluded Fannie Mae's charter conferred federal question jurisdiction over claims against Fannie Mae, and the court affirmed the judgment. (*Id.* at p. 690.) On January 18, 2017 the United States Supreme Court reversed, holding the charter did not grant federal courts jurisdiction over cases against Fannie Mae. (*Lightfoot v. Cendant*

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parties to the prior actions. Hollis-Arrington appealed, and the District of Columbia Circuit affirmed on March 10, 2005. On May 13, 2005 Hollis-Arrington filed a fifth lawsuit against Cendant and others in the United States District Court for the District of New Jersey (No. 1:05-CV-02556 FLW (AMD)). The district court dismissed the claims for violation of RICO and fraud and deceit based on res judicata, failure to state a claim, and lack of personal jurisdiction over one of the defendants who was not a party to the prior lawsuits. Hollis-Arrington appealed, and the Third Circuit affirmed, concluding she failed to state claims for fraud and deceit, and res judicata barred suit against Cendant. (*Hollis-Arrington v. PHH Mortgage Corp.* (3d Cir. 2006) 205 Fed.Appx. 48, 52-53, 55.)

[7] The federal district court entered judgment in favor of Attorneys Equity on June 11, 2010.

Mortgage Corp. (2017) 137 S.Ct. 553, 556, 565.) On March 24, 2017 the district court vacated the judgments in favor of defendants and remanded the action to state court. (*Lightfoot v. Cendant Mortgage Corp.* (C.D.Cal., Mar. 24, 2017, No. CV 02-6568 CMB (AJW)) 2017 U.S.Dist. Lexis 43510.)

On July 11, 2017 Hollis-Arrington filed a verified first amended complaint against Cendant, Attorneys Equity, Matthews, and the McGinnises. She alleged seven causes of action for wrongful foreclosure, fraud and deceit, quiet title, violation of the Unruh Civil Rights Act, slander of title, and intentional and negligent infliction of emotional distress.

F. *The Trial Court's Ruling on Cendant's Demurrer*

On August 10, 2017 Cendant filed a demurrer to the first amended complaint based on res judicata and failure to state facts sufficient to constitute a cause of action. On October 20 the trial court sustained the demurrer without leave to amend. The court found all causes of action were barred by res judicata because the proceedings in the four federal cases resulted in judgments on the merits, and Hollis-Arrington's claims in the first amended complaint were "essentially identical to the claims in federal court as they reach the same injury and the same duty." The court explained the state and federal cases all concerned the primary right to have a foreclosure conducted in accordance with state and federal law.

The court also ruled Hollis-Arrington failed to state a claim as to each cause of action. For the wrongful foreclosure and quiet title causes of action, the court concluded the amended complaint failed to allege tender, or an exception to the requirement. Further, the quiet title cause of action did not "appear to be

alleged against Cendant." The cause of action for fraud and deceit failed for lack of alleged injury from the misrepresentation and failure to plead fraud with specificity.

As to the Unruh Civil Rights Act cause of action, the court explained, "[S]he does not describe what accommodations, advantages, facilities, privileges or services she was denied on account of her race, that non-Black people were afforded. Instead, she seems to be alleging that [W]hite people that were not credit worthy were not given loans whereas [B]lack people who were not credit worthy were given loans. [¶] Moreover, there is no duty on the part of the lender to offer a loan that it knows the borrower can afford." The court concluded as to the slander of title cause of action, "To the extent that the trustee's deed upon sale is the slanderous publication, recording such a deed is privileged." Finally, the court found there was "no conduct *sufficiently alleged* in the complaint that amounts to outrageous conduct" to support the claims for the intentional and negligent infliction of emotional distress.

On November 17, 2017 the trial court entered an order entitled, "Order Sustaining Demurrer Without Leave to Amend," sustaining the demurrer as to Cendant and dismissing Cendant with prejudice. Hollis-Arrington timely appealed.[8]

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[8] "'[A]n order sustaining a demurrer without leave to amend is not appealable, and an appeal is proper only after entry of a dismissal on such order.'" (*Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1189; accord, *Yee v. Cheung* (2013) 220 Cal.App.4th 184, 192, fn. 5.) However, we construe the November 17, 2017 order as an order of dismissal because in the order the court dismissed Cendant from the action. (Code Civ. Proc., § 581d ["All dismissals ordered by the court shall be in the form of a written order signed by the court and filed in the action

DISCUSSION

A. *Standard of Review*

"In reviewing an order sustaining a demurrer, we examine the operative complaint de novo to determine whether it alleges facts sufficient to state a cause of action under any legal theory. [Citation.] Where the demurrer was sustained without leave to amend, we consider whether the plaintiff could cure the defect by an amendment." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162; accord, *Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010.) When evaluating the complaint, "we assume the truth of the allegations." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1230; accord, *McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.)

"A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324; accord, *Summers v. Colette* (2019) 34 Cal.App.5th 361, 367 [""We may affirm on any basis stated in the demurrer, regardless of the ground on which the trial court based its ruling.""].)[9]

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and those orders when so filed shall constitute judgments and be effective for all purposes . . . ."]; *Ward v. Tilly's Inc.* (2019) 31 Cal.App.5th 1167, 1173, fn. 3; *City of Los Angeles v. City of Los Angeles Employee Relations Bd.* (2016) 7 Cal.App.5th 150, 157.)

[9] With respect to Hollis-Arrington's claims for wrongful foreclosure and quiet title, we affirm the trial court's order sustaining the demurrer without leave to amend on grounds

A trial court abuses its discretion by sustaining a demurrer without leave to amend where "'there is a reasonable possibility that the defect can be cured by amendment.'" (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1100; accord, *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "'The plaintiff has the burden of proving that [an] amendment would cure the legal defect, and may [even] meet this burden [for the first time] on appeal.'" (*Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1132; accord, *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 971.)

B. *The Causes of Action for Fraud, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress Are Barred by Claim Preclusion*

We apply California law on claim preclusion to determine whether a prior federal court judgment on state claims bars relitigation of the claims in a state action. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 954-955, disapproved on another ground in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4; *Franceschi v. Franchise Tax Bd.* (2016) 1 Cal.App.5th 247, 257 ["Where an action is filed in a California state court and the defendant claims the suit is barred by a final federal judgment, California law will determine the res judicata effect of the prior federal court judgment on the basis of whether the federal and state actions involve the same primary right."]; *Gamble v. General Foods Corp.* (1991) 229 Cal.App.3d 893, 899 [same]; but see *Guerrero v. Department of Corrections & Rehabilitation*

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raised by Cendant in its demurrer, but not relied on by the trial court.

(2018) 28 Cal.App.5th 1091, 1100-1101 [applying federal claim preclusion law to determine whether federal judgment on federal claims precluded plaintiff from bringing similar factual allegations in state action].)

"Claim preclusion prevents relitigation of entire causes of action. [Citations.] Claim preclusion applies only when 'a second suit involves (1) the same cause of action (2) between the same parties [or their privies] (3) after a final judgment on the merits in the first suit.'" (*Samara v. Matar* (2018) 5 Cal.5th 322, 326-327; accord, *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824.) Claim preclusion is unavailable where the trial court rules on both the merits and a procedural ground in the first suit, but the appellate court affirms based solely on the procedural ground, because it is not "a 'final judgment on the merits.'" (*Samara*, at p. 338.)

"To determine whether two proceedings involve identical causes of action for purposes of claim preclusion, California courts have 'consistently applied the "primary rights" theory.'" (*Boeken v. Phillip Morris USA, Inc.* (2010) 48 Cal.4th 788, 797 (*Boeken*); accord, *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904.) "'[T]he primary right is simply the plaintiff's right to be free from the particular injury suffered.'" (*Mycogen Corp.*, at p. 904; accord, *Boeken*, at p. 798.) "'[T]he "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.'" (*Boeken*, at p. 798; accord, *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 631.) "'The primary right must also be distinguished from the *remedy* sought: "The violation of one

primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other.'"' (*Mycogen Corp.*, at p. 904; accord, *Crowley v. Katleman* (1994) 8 Cal.4th 666, 682.) "When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right." (*Boeken*, at p. 798; accord, *Agarwal v. Johnson, supra*, 25 Cal.3d at p. 954.)

It is undisputed that the first and second federal actions involved claims between the same parties (Hollis-Arrington and Cendant) and resulted in final judgments on the merits after the Ninth Circuit affirmed the judgments. The asserted claims also involved the identical causes of action or primary rights.

1. *Fraud and deceit*

Hollis-Arrington alleged almost identical claims for fraud and deceit in this action and her first and second federal actions. In the first federal action filed prior to the June 29, 2001 foreclosure sale, Hollis-Arrington alleged Cendant misrepresented that it would grant her a forbearance agreement, but it later denied her application. In the second federal action, filed two days before the June 29, 2001 foreclosure sale, Hollis-Arrington realleged the facts from the first federal action and also alleged Cendant (1) altered the information in her application to generate an automatic accept score from Fannie Mae's desktop underwriting system; (2) sent her a payment coupon book with a "fraudulently calculated" monthly payment amount; and (3) filed false declarations in the first federal action stating the foreclosure sale would be postponed, although it had

already taken place on September 18, 2000, preventing her from refinancing the loan. On July 1, 2002 the district court dismissed the second federal action, including the fraud and deceit claim, with prejudice.

Hollis-Arrington repeated the allegations of the first and second federal actions in this action: (1) Cendant falsified her application to generate an automatic accept score from Fannie Mae's desktop underwriting system; (2) Cendant sent her a payment coupon book with the wrong monthly payment amount; (3) a Cendant employee falsely stated he would approve the forbearance agreement, but Cendant later denied it; and (4) another Cendant employee falsely stated the foreclosure sale would be postponed to allow Hollis-Arrington to refinance, although the foreclosure had already occurred in violation of the bankruptcy automatic stay. These allegations of fraud and deceit are almost identical to the allegations made in the first and second federal actions. Because there were final judgments on the merits on Hollis-Arrington's claims for fraud and deceit against Cendant in the first and second federal actions, claim preclusion bars this cause of action. (*Samara v. Matar, supra*, 5 Cal.5th at pp. 326-327; *DKN Holdings LLC v. Faerber, supra*, 61 Cal.4th at p. 824.)

2. *Intentional infliction of emotional distress*

Claim preclusion bars Hollis-Arrington from relitigating the intentional infliction of emotional distress cause of action, based on the same facts as the claims for fraud and deceit, because Cendant obtained final judgments on the merits adjudicating the same claims in its favor in both the first and second federal actions. In granting summary judgment in favor

of Cendant in the first federal action, the district court ruled Cendant could not be liable for infliction of emotional distress for asserting its legal rights under the note and deed of trust to insist on timely payments and to initiate foreclosure proceedings after Hollis-Arrington failed timely to cure her default. (*Hollis-Arrington v. Cendant Mortgage Corp., supra*, 2002 U.S.Dist. Lexis 29703 at pp. *12-*13.) In the second federal action, the district court dismissed the intentional infliction of emotional distress claim with prejudice, ruling Hollis-Arrington failed to allege any facts to support the essential element of "outrageous conduct."

3. *Negligent infliction of emotional distress*

Hollis-Arrington's claim for negligent infliction of emotional distress is also barred by claim preclusion. To support this claim, Hollis-Arrington alleges Cendant knew or should have known that its "failure to exercise due care in conducting itself with respect to administering the mortgage, modification, and foreclosure process would cause [her] severe emotional distress." But in the first federal action, the court granted summary adjudication on Hollis-Arrington's negligence claim, finding Cendant did not owe Hollis-Arrington a duty of care. (*Hollis-Arrington v. Cendant Mortgage Corp., supra*, 2002 U.S.Dist. Lexis 29703 at pp. *11-*12.) The court also found Cendant could not be held liable for the infliction of emotional distress based on assertion of its legal rights under the note and deed of trust to insist on timely payments and to initiate foreclosure proceedings when Hollis-Arrington failed timely to cure her default. (*Id.* at pp. *12-*13.)

Adjudication of Hollis-Arrington's negligence claim bars a claim for negligent infliction of emotional distress based on the same facts. "[T]here is no independent tort of negligent infliction of emotional distress. [Citation.] The tort is negligence, a cause of action in which a duty to the plaintiff is an essential element." (*Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 984; accord, *Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1520 ["[R]ecovery of emotional distress is premised on defendant's negligence (i.e., breach of duty) that proximately causes emotional distress."].) "That duty may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship." (*Potter*, at p. 985; accord, *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205 (*Ragland*).) As the *Potter* court explained, "[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty." (*Potter*, at p. 985; accord, *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 155-156; *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 Cal.App.4th 761, 777.)[10]

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[10] "'[A]s a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.'" (*Ragland, supra*, 209 Cal.App.4th at p. 206 [affirming grant of summary judgment in favor of lender on claim for negligent infliction of emotional distress based on conduct of lender in urging borrower to miss loan payment to qualify for loan modification, although lender's actions resulted in foreclosure]; accord, *Lueras v. BAC Home Loans Servicing, LP*

Although the first federal action was filed before the June 29, 2001 foreclosure sale, Hollis-Arrington alleged in the second federal action Cendant accepted Hollis-Arrington's April 2001 payment, then failed to give her notice of her default on the loan, instead unlawfully holding the foreclosure sale. The second action also alleged that Cendant (1) altered the information in Hollis-Arrington's loan application to generate an automatic accept score from Fannie Mae's desktop underwriting system; (2) sent her a payment coupon book with a "fraudulently calculated" monthly payment amount; and (3) filed false declarations in the

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(2013) 221 Cal.App.4th 49, 67 ["a loan modification is the renegotiation of loan terms, which falls squarely within the scope of a lending institution's conventional role as a lender of money"].) However, several courts have found a lender has a duty of care where it accepts an application for a loan modification, then mishandles the application or engages in other negligent conduct in processing the application, typically resulting in foreclosure. (See *Rossetta v. CitiMortgage, Inc.* (2017) 18 Cal.App.5th 628, 641 [lender breached duty of care to borrower where it refused to consider application for loan modification until borrower was in default]; *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1183 [lender had duty of care to borrowers based on allegations lender mishandled application for loan modification and required borrowers to default on loan payments, resulting in default]; *Alvarez v. BAC Home Loans Servicing, L.P.* (2014) 228 Cal.App.4th 941, 951 [lender breached duty of care by delaying review of loan modification, relying on incorrect salary information in review, and foreclosing on property while lender was still considering loan modification].) Because Hollis-Arrington's claim for negligent infliction of emotional distress is barred by claim preclusion, we do not reach whether she adequately alleged Cendant breached a duty of care toward her.

first federal action stating the foreclosure sale would be postponed, although it had already taken place, preventing her from refinancing the loan.

Although Hollis-Arrington did not assert a claim in the second federal action for negligence or the negligent infliction of emotional distress, instead asserting a claim for negligent misrepresentation, her claim in this action for negligent infliction of emotional distress alleges the same underlying facts, the same injury, and the same "'harm suffered'" (inability to refinance her home and the ultimate sale of her home), which "'gives rise to only one claim for relief.'" (*Boeken, supra*, 48 Cal.4th at p. 798; accord, *Hayes v. County of San Diego, supra*, 57 Cal.4th at p. 631.) Hollis-Arrington argues she should be allowed leave to amend to allege Cendant engaged in predatory lending by targeting Black loan applicants and profiting from the loans once they were in default. But these same allegations were also included in the second federal action. Therefore, the trial court did not abuse its discretion in denying leave to amend.

C. *Hollis-Arrington Failed To State a Cause of Action for Wrongful Foreclosure*[11]

"'"The elements of a wrongful foreclosure cause of action are: "'(1) [T]he trustee or mortgagee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; (2) the party attacking the sale (usually but not always the trustor or mortgagor) was

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[11] Because the claims for wrongful foreclosure, quiet title, slander of title, and violation of the Unruh Civil Rights Act fail to state a claim, we do not reach whether claim preclusion applies to bar these claims.

prejudiced or harmed; and (3) in cases where the trustor or mortgagor challenges the sale, the trustor or mortgagor tendered the amount of the secured indebtedness or was excused from tendering.""""" (*Citrus El Dorado, LLC v. Chicago Title Co.* (2019) 32 Cal.App.5th 943, 948; accord, *Turner v. Seterus, Inc.* (2018) 27 Cal.App.5th 516, 525; *Kalnoki v. First American Trustee Servicing Solutions, LLC* (2017) 8 Cal.App.5th 23, 47 (*Kalnoki*).) Tender is not required where (1) "the borrower attacks the validity of the underlying debt," (2) "the borrower has a counterclaim or setoff against the beneficiary," (3) "it would be inequitable to impose the requirement," or (4) "the trustee's deed is void on its face." (*Kalnoki*, at p. 47; accord, *Turner*, at pp. 525-526; *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 112-113.)

Hollis-Arrington bases her wrongful foreclosure cause of action on a purportedly invalid substitution of trustee executed by Cendant. She alleges that after Cendant sold the loan to Fannie Mae, it no longer had the authority to substitute Attorneys Equity as the trustee because Cendant was no longer the beneficiary under the deed of trust. But the deed of trust attached to the first amended complaint names Cendant as the beneficiary, as does the substitution of trustee. Hollis-Arrington did not attach to the first amended complaint or request the court take judicial notice of any document showing a change in the beneficiary designation. Although Hollis-Arrington alleges Cendant was no longer the beneficiary, because the allegation conflicts with a document attached to the first amended complaint, "we may disregard [the plaintiff's] conflicting allegations." (*Kalnoki, supra*, 8 Cal.App.5th at p. 38; accord, *Holland v. Morse Diesel Internat., Inc.* (2001) 86 Cal.App.4th 1443, 1447 ["If facts appearing in the exhibits contradict those

alleged, the facts in the exhibits take precedence."], superseded by statute on other grounds as stated in *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 521.)

Thus, as the beneficiary of the deed of trust, Cendant had authority to substitute Attorneys Equity as trustee in place of First American Title Insurance Co. (*Kalnoki, supra*, 8 Cal.App.5th at p. 39 [company identified as beneficiary on deed of trust was authorized to substitute trustee]; *Jones v. First American Title Ins. Co.* (2003) 107 Cal.App.4th 381, 383 ["Civil Code section 2934a, subdivision (a)(4) provides that the beneficiary of a deed of trust may replace the appointed trustee simply by recording a substitution, and that 'the new trustee shall succeed to all the powers, duties, authority, and title granted and delegated to the trustee named in the deed of trust.'"].)

In addition, as the designated loan servicer for Fannie Mae, Cendant had authority to execute the substitution of trustee as Fannie Mae's agent. (Civ. Code, § 2304 ["An agent may be authorized to do any acts which his principal might do, except those to which the latter is bound to give his personal attention."]; *Kalnoki, supra*, 8 Cal.App.5th at p. 40 [an agent on behalf of beneficiary may execute substitution of trustee]; *Dimock v. Emerald Properties* (2000) 81 Cal.App.4th 868, 872 [same].) Because Hollis-Arrington has not alleged any additional facts to support her allegation the foreclosure sale was illegal, fraudulent, or willfully oppressive based on an invalid substitution of trustee, the trial court did not abuse its discretion in denying leave to amend the wrongful foreclosure cause of action.

Hollis-Arrington on appeal addresses a potential claim for violation of the Homeowner Bill of Rights (HBOR), Civil Code section 2923.6. To the extent she is requesting leave to amend to assert a claim under HBOR, we deny the request because HBOR does not apply retroactively to the loan negotiations at issue here. "'[HBOR], effective January 1, 2013, was enacted "to ensure that, as part of the nonjudicial foreclosure process, borrowers are considered for, and have a meaningful opportunity to obtain, available loss mitigation options, if any, offered by or through the borrower's mortgage servicer, such as loan modifications or other alternatives to foreclosure." ([Civ. Code,]§ 2923.4, subd. (a).)'" (*Schmidt v. Citiank, N.A.* (2018) 28 Cal.App.5th 1109, 1114-1115; accord, *Valbuena v. Ocwen Loan Servicing, LLC* (2015) 237 Cal.App.4th 1267, 1272.) HBOR does not apply retroactively. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 818.) Because the loan forbearance negotiations between Hollis-Arrington and Cendant occurred in 1999 and 2000, Hollis-Arrington cannot allege a viable claim for violation of HBOR.

D. *The Quiet Title Cause of Action Was Properly Dismissed Because Cendant Does Not Have an Adverse Claim to the Property*

The trial court found Hollis-Arrington failed to state a claim for quiet title against Cendant because the first amended complaint did not name Cendant in the cause of action and did not allege Hollis-Arrington tendered the debt. Hollis-Arrington contends on appeal she can cure these defects by naming Cendant in the claim and amending the complaint to allege an exception to the tender rule. But even with these amendments,

the claim fails because Cendant does not have an adverse interest in the property.

"'An element of a cause of action for quiet title is "[t]he adverse claims to the title of the plaintiff against which a determination is sought." (Code Civ. Proc., § 761.020, subd. (c).'" (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1010; accord, *West v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 780, 802-803.) Hollis-Arrington's quiet title claim fails against Cendant because Cendant sold the property at the June 29, 2001 foreclosure sale to Feldman and Tennen, and therefore it does not have an adverse claim to the property. Because Hollis-Arrington's proposed amendment to name Cendant and allege tender will not cure this defect, the trial court did not abuse its discretion in denying leave to amend.

E. *The Slander of Title Cause of Action Fails Because Cendant's Recording of the Deed of Trust Is a Privileged Publication*

Hollis-Arrington does not challenge the dismissal of her slander of title cause of action in her opening brief, thereby forfeiting the issue. (*Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 296, fn. 7 ["Issues not raised in the appellant's opening brief are deemed waived or abandoned."]; *Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 63 [argument made for the first time in reply brief is forfeited].)

Even if the issue had not been forfeited, the first amended complaint fails to state a cause of action for slander of title. "To state a claim for slander of title, a plaintiff must allege '(1) a publication, (2) which is without privilege or justification,' (3)

which is false, and (4) which 'causes direct and immediate pecuniary loss.'" (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1336 (*Schep*); accord, *Deutsche Bank National Trust Co. v. Pyle* (2017) 13 Cal.App.5th 513, 527, fn. 7.) Hollis-Arrington bases this claim against Cendant on its alleged false and disparaging publication of the trustee's deed. But, as noted by the trial court, the recording of the trustee's deed is privileged. (*Schep*, at pp. 1336-1337 [plaintiff did not state claim for slander of title based on recording of notice of sale, notice of default, and trustee's deed upon sale because the act of recording was privileged].) As the court in *Schep* explained, "[Civil Code s]ection 2924, subdivision (d)(1), provides that '[t]he mailing, publication, and delivery of notices as required' by section 2924 'constitute privileged communications pursuant to [Civil Code s]ection 47.' ([Civ. Code,] § 2924, subd. (d)(1).) [Civil Code s]ection 2924 mandates the recording of both a notice of default (*id.*, subd. (a)(1)), and a notice of sale (*id.*, subd. (a)(3))." (*Schep*, at p. 1336.)[12]

Because Hollis-Arrington bases her slander of title claim on the recording of the deed of trust, the trial court did not err in sustaining the demurrer to this claim, nor did it abuse its discretion in denying leave to amend.

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[12] As the Court of Appeal in *Schep* observed, the courts are divided on whether the absolute or qualified privilege under Civil Code section 47, subdivisions (b) (absolute) or (c) (qualified), applies to the recording of a deed of trust under Civil Code section 2924, subdivision (d)(1). (*Schep, supra*, 12 Cal.App.5th at p. 1337.) We do not reach this issue because Hollis-Arrington fails to argue on appeal that only the qualified privilege applies to the recording of foreclosure documents.

F. *Hollis-Arrington Fails To State a Cause of Action for Violation of the Unruh Civil Rights Act*

The Unruh Civil Rights Act provides, "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." (Civ. Code, § 51, subd. (b).) "The Unruh Civil Rights Act antidiscrimination provisions apply to business establishments that offer to the public 'accommodations, advantages, facilities, privileges, or services.'" (*North Coast Women's Care Medical Group, Inc. v. Superior Court* (2008) 44 Cal.4th 1145, 1153; accord, *Candelore v. Tinder, Inc.* (2018) 19 Cal.App.5th 1138, 1144-1145; *Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1126 ["'The Unruh Civil Rights Act broadly outlaws arbitrary discrimination in public accommodations . . . .'"].) The Unruh Civil Rights Act "subjects to liability '[w]homever denies, aids or incites a denial, or makes any discrimination or distinction contrary to [the Act].'" (*North Coast Women's Care Medical Group, Inc.*, at p. 1154.)

The first amended complaint alleges Cendant enabled Black applicants with poor credit histories to obtain loans by falsifying their loan applications to show better credit, but Cendant did not do the same for similarly situated White applicants, who could not obtain the loans. According to the first amended complaint, this practice was discriminatory because Cendant set up the Black applicants to fail and default on their loans. But as the trial court found, the complaint fails to allege

how Cendant denied Hollis-Arrington "full and equal accommodation, advantages, facilities, privileges, or services" based on racial discrimination. (Civ. Code, § 51, subd. (b).) To the contrary, Cendant afforded preferential treatment to Black applicants by enabling them to obtain loans that were denied to White applicants.

Hollis-Arrington contends she can cure this defect in her Unruh Civil Rights Act cause of action by alleging Cendant "was a predatory lender, which was intentionally qualifying [B]lacks for loans, so it could prey on those [B]lack consumers, have them pay inflated monthly rates with excessive PMI [(private mortgage insurance)], then inevitably go into default and be foreclosed upon." But these predatory lending allegations simply provide additional detail to her claim, and do not show Cendant denied Hollis-Arrington her right to "full and equal accommodation, advantages, facilities, privileges, or services" based on its discrimination against Blacks. (Civ. Code, § 51, subd. (b).)

Moreover, Cendant owes no duty of care to an unqualified borrower when approving a loan. (*Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429, 436 ["A lender is under no duty 'to determine the borrower's ability to repay the loan. . . . The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's.'"]; *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 35 [bank was not negligent in approving loan to borrowers for risky venture].) Given the legal defects in Hollis-Arrington's claim, the trial court did not abuse its discretion in denying leave to amend.

DISPOSITION

We affirm the order dismissing Cendant from the action with prejudice. Cendant shall recover its costs on appeal from Hollis-Arrington.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.